DRN-5637920

The complaint

Mr J and Mrs MJ's complaint is, in essence, that First Holiday Finance Ltd ('the Lender') acted unfairly and unreasonably by (1) declining to meet their claims of misrepresentation under Section 75 of the Consumer Credit Act 1974 ("CCA") and (2) being party to an unfair credit relationship with them under Section 140A of the CCA. Mr J and Mrs MJ bring this complaint with the assistance of a third-party professional representative (the 'PR').

What happened

In early 2018, Mr J and Mrs MJ owned a timeshare trial membership, purchased from a supplier (the "Supplier"). While on a holiday (provided by the Supplier) in June 2018 (the "First Time of Sale") Mr J and Mrs MJ attended a further sales meeting with the Supplier, as a result of which Mr J and Mrs MJ upgraded their trial membership to the Supplier's Fractional Points Owners' Club (the "Fractional Club") membership. In November 2018 they attended a similar meeting with the Supplier and they upgraded their membership by purchasing an upgraded membership (the "Second Time of Sale").

Fractional Club membership was asset backed – which meant it gave Mr J and Mrs MJ more than just holiday rights. It also included a share in the net sale proceeds of a property (the "Allocated Property") named on Mr J and Mrs MJ's agreements with the Supplier (the "Purchase Agreements") after the membership terms ended.

The First Purchase Agreement (in both Mr J and Mrs MJ names) bought Mr J and Mrs MJ 1040 fractional points at a cost of £18,400. This purchase was funded by trading in the trial membership and taking credit of £18,165 (in Mr J and Mrs MJ's names), provided by The Lender (the "First Credit Agreement").

The Second Purchase Agreement (in both Mr J and Mrs MJ names) bought Mr J and Mrs MJ 1420 fractional points at a cost of £24,020. This purchase was funded by trading in the First Fractional Club membership and taking credit of £28,777 (in Mr J and Mrs MJ's names), provided by The Lender (the "Second Credit Agreement").

The First Purchase Agreement consolidated the trial membership borrowing of £3961 and the Second Purchase Agreement consolidated the First membership borrowing of £18,278. The Lender has said that the borrowing was written off in July 2021 with Mr J and Mrs MJ having only repaid £1855 across all the borrowing with the Lender.

In August 2022 they appointed the PR to act on their behalf in pursuing complaints about their financial arrangements. With the PR's assistance Mr J and Mrs MJ complained to The Lender on 17 August 2022 (the "Letter of Complaint")[1] to complain about:

- Misrepresentations under Section 75 of the CCA which led to Mr J and Mrs MJ losing out and which also led to an unfair relationship under section 140A of the CCA.

[1] The PR actually sent two identically worded letters to the Lender on that date dealing with each sale – I have treated this as one complaint.

- They were misrepresented to when they were told they were making an investment which would make them a profit. This was a direct breach of 14.3 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.
- They were misrepresented to when they were told they could easily sell the membership back to the Supplier.
- That they were misrepresented to on the availability of the holidays.
- That the membership contract included unfair contract terms including that if they didn't pay the annual fees the Supplier could rescind the contract.
- That the Supplier had breached the contract by going into administration.
- That the sales agents selling the memberships were unauthorised credit intermediaries and this makes the contract unenforceable and Mr J and Mrs MJ could recover what they paid under the Credit Agreement.
- That no affordability checks were done during the sale and thus there was irresponsible lending in the arrangement of the finance for the purchase of this membership.

The Letter of Complaint makes the argument that The Lender is, as deemed principal of the Supplier, liable to Mr J and Mrs MJ for the above and sets out a claim in damages.

The Lender issued its responses to the two membership purchases on 26 August 2022 rejecting the complaint in every regard. So, the PR brought the complaint to this service.

Mr J and Mrs MJ's complaint was assessed by an investigator and having considered the information on file, our investigator proposed that the complaint should be not upheld on its merits. But the PR disagreed with the investigator's assessment and asked for an ombudsman to review and determine matters. In the course of the PR's representations Mr J supplied a statement as to what happened and in that he made the additional claim that they had been 'coerced' into the purchase of the membership.

I then issued a provisional decision dated 9 May 2025 which did not uphold Mr J and Mrs MJ's complaint. The Lender agreed with my position. The PR didn't agree with my position and provided further arguments on the matter.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant times. I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

• The CCA (including section 75 and sections 140A-140C).
• The law on misrepresentation.
• The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations").
• The Consumer Rights Act 2015 ("the CRA").
• The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").
• Case law on Section 140A of the CCA – including, in particular:
    • The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ("Plevin"), which remains the leading case in this area.
    • Scotland v British Credit Trust [2014] EWCA Civ 790 ("Scotland and Reast")
    • Patel v Patel [2009] EWHC 3264 (QB) ("Patel").

• The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ("Smith").
• Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ("").
• Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ("Kerrigan").
• R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ("Shawbrook & BPF v FOS").

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But I'm also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant times – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the "RDO Code").

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done that, I am not upholding this complaint. I shall deal with the arguments made by the PR on behalf of Mr J and Mrs MJ in response to my provisional position under the heading 'further arguments'. But first I shall quote from my provisional position-in italics for ease of reading.

I want to make it clear that my role as an ombudsman isn't to address every single point that has been made to date. Rather, it is to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it. Where necessary, I've reached my conclusions on the balance of probabilities; in other words, based on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75: The Supplier's alleged misrepresentations at the Times of Sale

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier. In short, a claim against The Lender under section 75 essentially mirrors the claim Mr J and Mrs MJ could make against the Supplier.

Certain conditions must be met for section 75 to apply including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. I'm satisfied those conditions are met in this case and note that the Lender doesn't dispute this aspect of the matter. Bearing in mind the way in which section 75 operates, if the Supplier is liable for having misrepresented something to Mr J and Mrs MJ at the Times of Sale, the Lender is also liable.

I have set out above the alleged misrepresentations made by the Supplier at the Times of Sale. Although PR (on behalf of Mr J and Mrs MJ) included in its submissions several examples of what it considered to be the Supplier's misrepresentations, I think only one of the points made could reasonably meet the definition of a false statement of fact (or law)

necessary to a claim in misrepresentation. That is, that the Supplier told them they could sell the membership back to the Supplier. The other points are at best allegations of acts or omissions that would not be covered by a section 75 claim. I will consider these allegations in the remainder of this decision when considering whether there is an unfair credit relationship.

I don't think the available evidence supports that the Supplier made a statement as to it purchasing the membership back from Mr J and Mrs MJ. Mr J says that he could sell it back when the Loan Agreement ended in his written comments of 13 February 2024. He said:

"They also said that when the loan came to the end then we could sell the fraction and we would get our money back or even make a profit due to the price of property going up."

To me, this fits more with what might happen when the membership term ended and the Allocated Property was sold and I can't see he said he thought he could sell membership back to the Supplier at any time. And the documents from the point of sale make clear the term of the membership and that the allocated property is sold at the end of the membership and that the Supplier didn't buy back ongoing memberships. I've also considered what I know about the Supplier's sales process and there is nothing that makes me think Mr J and Mrs MJ would have been told the Supplier bought back memberships, instead that would be in direct contradiction to what was written in the documents. So even if there was such a statement made, I can't see that it was important to them when deciding to purchase. If follows, I don't think this was an actionable misrepresentation.

Section 75: The Supplier's alleged breaches of contract

Mr J and Mrs MJ ***say that*** *they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr J and Mrs MJ states that the availability of holidays was/is subject to demand. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.*

Our investigator did not think that the timeshare provider being in liquidation meant Mr J and Mrs MJ were not able to get the things they were entitled to under the timeshare agreement. But I cannot see that Mr J and Mrs MJ have made any persuasive claim that the agreement was actually breached. Rather, I think the complaint was that, as the company is in liquidation, it could not pay any sums awarded by a Spanish court. But as is clear from the evidence it was English Law that applies in relation the lender's lending here. So, I cannot see how the Lender could be responsible for covering the amounts awarded in Spain in any event, irrespective of the status of the Supplier. Furthermore, as I'm not persuaded that there was any breach here due to the facts of the case whether or not such remedy could be provided doesn't make a difference to this complaint about the Lender.

As a result, I don't think The Lender unfairly or unreasonably declined Mr J and Mrs MJ's compensation for the misrepresentations he said it was liable for under section 75.

Section 140A: did The Lender participate in an unfair credit relationship?

I have already explained why I'm not persuaded the Supplier misrepresented the Purchase Contract in a way that makes for a successful section 75 claim and outcome in this complaint. But Mr J and Mrs MJ also makes arguments that either say or infer that the credit relationship between them and The Lender was unfair under Section 140A of the CCA, when

looking at all the circumstances of the case, including parts of Supplier's sales process at the Times of Sale that they have concerns about. It is those concerns that I explore here.

As section 140A of the CCA is relevant law, I have considered it when determining what is fair and reasonable in all the circumstances of the case. That means considering whether the credit relationship between Mr J and Mrs MJ and The Lender was unfair.

Under section 140A, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement), (Section 140A(1) of the CCA).

Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator." As a result, it provides a foundation for a number of provisions that follow it. It also creates a statutory agency in particular circumstances. The most relevant to this complaint is negotiations "conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c)" (Section 56(1)(c) of the CCA).

The arrangements between Mr J and Mrs MJ, the Supplier, and The Lender were such that the negotiations conducted by the Supplier during its sale of this Fractional Club membership to Mr J and Mrs MJ were antecedent negotiations under section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for The Lender as per section 56(2). And such antecedent negotiations were "…any other thing done (or not done) by, or on behalf of, the creditor…" under section 140A(1)(c).

Antecedent negotiations under Section 56 cover both the acts and omissions of C, based on my understanding of relevant law (See, for example Plevin, at paragraph 31, and Shawbrook & BPF v FOS at paragraph 135). I note that in the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say, in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair." (The Court of Appeal's decision in Scotland was recently followed in Smith.)

It follows that I see no great difficulty with Mr J and Mrs MJ's position that the supplier is deemed agent of the Lender for the purpose of the pre-contractual negotiations. I recognise that an assessment of unfairness under section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered

into. The High Court held in Patel (which was approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

Despite the breadth of the unfair relationship test under section 140A, it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A…does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with…whether the creditor's relationship with the debtor was unfair."

Instead, the Supreme Court said in Plevin that the protection afforded to debtors by section 140A is the consequence of all of the relevant facts.

I've considered the entirety of the credit relationship between Mr J and Mrs MJ and the Lender along with all of the circumstances of the complaint. Having done so, I don't think the credit relationship between them was likely to have been rendered unfair for section 140A purposes. In coming to that conclusion, and in carrying out my analysis, I've looked at:

> *1. the Supplier's sales and marketing practices at the Times of Sale – which includes any material provided that I think is likely to be relevant to the sale; and*
> *2. the Supplier's provision of information at the Times of Sale, including the contractual documentation and disclaimers made by C;*
> *3. Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;*
> *4. The inherent probabilities of the sale given its circumstances.*

I've considered the impact of these on the fairness of the credit relationship between Mr J and Mrs MJ and The Lender.

The Supplier's sales and marketing practices at the Time of Sale

Mr J and Mrs MJ complained about The Lender being party to an unfair credit relationship for several reasons, which I've set out in this decision.

Mr J and Mrs MJ have said they felt 'coerced' by the Supplier into purchasing Fractional Club membership at the Second Time of Sale. He has indicated the sales process lasted several hours, that there were so many documents to sign, and that he felt coerced to proceed having been pushed 'pillar to post.' But across the correspondence we have Mr J and Mrs MJ have said little about what the Supplier actually said and/or did during the sales presentation that made Mr J and Mrs MJ feel as if they had no choice other than to purchase Fractional Club membership when they didn't want to. Neither the overall time Mr J and Mrs MJ spent with the Supplier during the sales processes nor the number of documents they needed to read and sign appear to me to be particularly excessive, given the nature of the purchase they were making.

Further, while Mr J and Mrs MJ was given a 14-day cooling off period, they didn't try to cancel their membership during those times.

That along with Mr J and Mrs MJ's actions at the time aren't suggestive to me that Mr J and Mrs MJ felt that they had no viable alternative to purchasing the membership or made a

purchasing decision they otherwise wouldn't have done but for a pressured sale. Overall, I'm not persuaded they were pressured into taking this second membership (or indeed the first).

For the reasons I've explained I'm not persuaded that Mr J and Mrs MJ's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is a further reason why their credit relationship with The Lender might be rendered unfair to them. That's the suggestion that Mr J and Mrs MJ purchased Fractional Club membership because the Supplier marketed and sold it to them as an investment in breach of prohibition against selling timeshares in that way.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations, and if so, was this aspect material to Mr J and Mrs MJ's decision to purchase membership?

The Lender does not dispute, and I am satisfied, that Mr J and Mrs J's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr J and Mrs MJ's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. The provision at the Time of Sale said that "A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract." And Mr J and Mrs MJ's PR has argued that this is what happened in this case, albeit more vociferously latterly.

The fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract in itself. In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold. To conclude that Fractional Club membership was marketed or sold to Mr J and Mrs MJ as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment; that is, told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (a profit) given the facts and circumstances of this complaint.

Not only that but, as the Supreme Court's judgment in Plevin makes clear, it does not

automatically follow that any such regulatory breach would create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. That includes taking into account the material impact of any breach on the customer's decision whether to enter into the Purchase Agreement.

So, I also must be satisfied that it was more likely than not that the prospect of a financial gain was a material factor in Mr J and Mrs MJ's purchasing decisions. I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation. In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr J and Mrs MJ and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr J and Mrs MJ, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

There is evidence in this case that C made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers such as Mr J and Mrs MJ the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership wasn't sold to Mr J and Mrs MJ as an investment. It is nonetheless possible that the Supplier marketed and sold Fractional Club membership to Mr J and Mrs MJ as an investment, and so I've thought about their evidence in this respect, and what prompted them to enter into the Purchase Agreement.

In the original letters of claim to the Lender the issue of whether it was sold as an investment was raised by the PR but no persuasive (to my mind) description of how this was done or

what was said was given. So, I can understand why neither the Lender nor the investigator were persuaded by it. In response to the findings of the Investigator the PR provided an email from Mr J and Mrs MJ on the matter dated 13 February 2024. And while I've noted Mr J and Mrs MJ's more recent evidence, I must take into account that these were made following the outcome of Shawbrook & BPF v FOS, and that they are in some material respects quite different from the assertions made when they brought the complaint originally through their letter of claim (sent by their PR). I accept of course that being asked to recall specific information some years later is rendered more difficult with the passage of time. But it does seem to me that evidence has evolved over time in such a way that, in my view, it would be incorrect to place significant weight on what has been said more recently on what were the motivating factors in Mr J and Mrs MJ's decision to purchase the membership. For example, the original complaint was that this was sold as an investment that could be sold back to the Supplier at any time, but I simply do not see that as being a part of Mr J and Mrs MJ's later evidence.

I also note in this email that it seems clear that the primary motivating factor with regard to the first time of sale was that it enabled them to have a honeymoon. They've said in relation to this purchase that "We were so excited because we were able to arrange a holiday as a honeymoon in the November 2018". Mr J and Mrs MJ do also state in that email that they could make a profit from selling the membership when it came to an end. However, I also note that they describe being very excited about the 'free holiday' the were on and that this first purchase enabled them to get what they've described as holidays "for a very low cost." So, I'm not persuaded that the investment element of this membership was a motivating factor in this purchase. It seems likely to me from what they've said here they'd have gone ahead with this purchase whether or not there had been a breach of Regulation 14.3 as their primary interest was in the holidays offered.

I've also considered this email with regard to the second time of sale when they increased their membership. I note that they say that when considering this they thought about "how are whole family could make use of it" (sic). In relation to the second time of sale Mr J and Mrs MJ make no mention of the investment element of the membership being put to them during the sale at all. And I think that gives an important insight into their motivations here.

Had Fractional Club membership been marketed and sold as an investment by the Supplier at the Times of Sale and that had been a key factor in Mr J and Mrs MJ's purchasing decisions, it is difficult to understand why Mr J and Mrs MJ email and their PR's original letter of claim on the matter did not persuasively argue this point. I say this particularly in light of the lengths to which the PR went in the original letters of claim in seeking to demonstrate the other arguments that were made about what was wrong with these purchases. Additionally, there's nothing in the way of any specific detail about what they were told about a financial gain or the profit they might make provided in any of these written comments on the matter.

On balance, therefore, even if the Supplier marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr J and Mrs MJ's decision to purchase Fractional Club membership at the Times of Sale were motivated by the prospect of a financial gain (a profit).

On the contrary, I think the evidence suggests Mr J and Mrs MJ purchasing decision was founded on their strong attraction to the holiday arrangements Fractional Club membership provided. So, I'm minded that they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I'm not currently inclined to think the credit relationship between Mr J and Mrs MJ and The Lender was unfair to them whether or not the Supplier breached Regulation 14(3).

Unfair Contract Terms

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr J and Mrs MJ when they purchased membership of the Fractional Club at the Time of Sale. The PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the CRA.

One of the main aims of the Timeshare Regulations and the CRA was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I note that neither the PR or Mr J and Mrs MJ have described how the operation of the terms the PR has pointed to has led to unfairness in the particular circumstances of Mr J and Mrs MJ. And referring to what I've said before regarding any "such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way", it's difficult to say that there was any impact on Mr J and Mrs MJ. So even if I was persuaded the terms referred to were unfair contract terms (which I'm not) I've not seen enough to persuade me that any such term was operated unfairly to Mr J and Mrs MJ or caused an unfairness in the credit relationship.

In summary, given all of the facts and circumstances of this complaint, I don't think the credit relationship between The Lender and Mr J and Mrs MJ was unfair to them for the purposes of Section 140A. So, I don't propose to uphold this aspect of the complaint on that basis.

Is the loan agreement voidable?

I have seen the PR referencing the findings of Spanish courts on similar cases and suggesting that the membership here was illegal. I have seen no persuasive reason why the either of these timeshare agreements would be voidable under English law (the law that applies in this case). It therefore follows that I do not think the associated credit agreement is voidable.

Was the timeshare provider an authorised broker?

At the time of sale, the regulation of consumer credit was performed by the FCA and I have seen that the timeshare provider had the requisite authority. But the actual complaint made by the PR here is that the sales staff were not employees of the supplier. However, the Lender has confirmed that the sales representative that dealt with Mr J and Mrs MJ's purchases were employed by the Supplier and had undertaken training in brokering sales. I have no reason to doubt this, so I do not think the brokering of the credit in these sales was unauthorised.

Were the right affordability checks carried out at the time of sale?

Originally Mr J and Mrs MJ have said that they do not recall any checks being carried out at the time of sale and the PR says this means the lending was irresponsible. Our investigator said that she could not see any evidence that this was a case of irresponsible lending. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if the Lender did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr J and Mrs MJ lost out as a result of its failings. Neither Mr J and Mrs MJ nor their PR has provided any persuasive evidence that they at the times of sale would have found it difficult to repay the loan. And whether they had later difficulty in paying the loan is not persuasive evidence that they could not afford the lending at the times it was taken. I also note that the PR here on receipt of the Investigators findings on this matter chose to neither contend them nor provide any further evidence on this point and it is not mentioned in the evidence from Mr J and Mrs MJ. So, I see no persuasive reason to uphold this element of their complaint.

Further arguments

I've considered the comments of the PR here and additional statement from Mr J and Mrs MJ. A significant part of these representations relates to what is already agreed or already known to the parties (for example the relevant law). So I see no need to comment on those representations.

I should start by saying that gaps and inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between the submissions made here by Mr J and Mrs MJ. But I reiterate, the question to consider is whether there is a core of acceptable evidence from Mr J and Mrs MJ say that the inconsistencies have little to no bearing on whether their testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did.

The PR has supplied an email they sent to Mr J and Mrs MJ asking them certain questions "*regarding your previous email with your witness statement. Note: I am not sending you the decision itself because I do not want it to influence your response."* This email leads to a response from Mr J and Mrs MJ dated 19 May 2025. And although there are questions which are broad open questions set by the PR, I also consider some of the questions (to varying degrees) leading and potentially do influence their response. For example:

- "*Would you go ahead with the deal if there was no promise that at the end of the term the fraction would be sold and you would get your money back with a profit?"*
- *"Do you think that your recollections are correct and clear? Do you think that what you remembered about what the sales representatives of (*the Supplier*) told you that you would get your "money back" and "make a profit" is accurate?"*

In Mr J and Mrs MJ's response to these questions they essentially agree with the PR that this is what happened. However, their response provides no persuasive description of what was actually said that was important to them or what happened when and where. In short it is my assessment that we have the original letters of claim, a post assessment statement from Mr J and Mrs MJ and a post provisional decision statement from them, none of which give a persuasive or detailed description of how the membership was sold to them in this case. Simply repeating in other words that it was sold in contravention of 14(3) is not persuasive in itself or persuasive of the Lender treating the claim unfairly by declining it. Or indeed sufficient for me to be persuaded to alter my position on the matter. I also note that considering the evidence of Mr J and Mrs MJ in the round there is a distinct and noticeable evolution of that. For example, in the letters of claim there are numerous issues raised including being able to sell back the allocated property, availability of the property, whether the broker was an unauthorised intermediary, that the Supplier was in liquidation and that

the contract included unfair terms. The post assessment statement of Mr J and Mrs MJ to my mind has a focus on the holidays for use as honeymoon and for family. By the latest statement of Mr J and Mrs MJ it is my position that the focus is around the issues of investment and profit and the holidays aspect of this membership is not as important to them as before if at all.

The PR has said in their submissions in response to my provisional decision that the investigator's assessment was not shown to her clients. It is unclear to me to what they would have objected to if they were unaware of the reasoning to the investigators assessment. It would seem to me that the focus of Mr J and Mrs MJ's statements has noticeably changed and when paired with some of the questions the PR put to them and the because of the lack of explanation as to what was purportedly said to them during the sales in question (or details of those events more broadly), I'm not persuaded that I can place substantial weight on what they have said in this claim.

I also remain unpersuaded that any breach of Regulation 14(3) was material to Mr J and Mrs MJ's purchasing decision. I have thought about these purchases in the round. Mr J and Mrs MJ were given the full value of the trial membership as a trade-in allowance off the purchase price of the first membership. And the full Fractional Club membership entitled them to a week's accommodation every year for 19 years, as opposed to five weeks in the following three years as in the trial membership. Recently Mr J and Mrs MJ have said "*However, the honeymoon holiday was not the most important reason for us. We would not go ahead with the deal if there was no return at the end, because, as I said, this was important for our future.*" But this clearly doesn't take into account the substantial increase in holiday benefits that they purchased giving them holidays annually for many years unlike the trial membership. And does not sit well with their earlier comments about their excitement about having a honeymoon that they accept the supplier 'facilitated'.

Finally, the PR has said I have misapplied *Carney* and *Kerrigan*, and that there only had to be "some material impact" from a breach of Regulation 14(3) to render the associated credit relationship unfair. But I don't agree that I misapplied either case here. In my PD I said:

"I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. […]

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to

all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs C and Mr S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration."

The PR has also said "*I think it is wrong to seek on the balance of probabilities the investment element to be the primary motivating factor."* What I actually said (which the PR actually quotes) was *"So, I'm not persuaded that the investment element of this membership was a motivating factor in this purchase."* So, I didn't actually say or apply the test the PR argued against. And although the PR has focussed on some of the language I've used in my decision from a semantics point of view, I'm not persuaded I've misapplied the relevant considerations in this case whether it be regulations, legislation or case law.

And as I said in my provisional position, and I maintain now, although Mr J and Mrs MJ have said in their statements (and their more recent answers) that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, I don't feel I can place much, if any, weight on this in my determination of this case for the variety of reasons I've given. For this reason, and from all of the circumstances, I am simply not persuaded that this was the case.

So, it follows that I am not persuaded that the credit relationship between Mr J and Mrs MJ and the Lender was unfair to them.

Other matters

I have also reconsidered everything else that I said in my provisional position in response to the other aspects of the complaint. The PR has not provided any further evidence or arguments in relation to these other points, and having reconsidered them, I see no reason to depart from my findings on these as set out in the Provisional position.

And even though it makes no difference to the above it is worth noting for Mr J and Mrs MJ's information that even if I were persuaded to uphold this complaint (which I'm not) it would seem, based on the amount they repaid to the lending, that any redress would likely be insignificant (if not zero) due to the holidays they did take. That's because our standard approach would be for any benefits received (such as holidays) to be deducted from any redress amount (which would equate to what was actually repaid to the lending plus interest).

Conclusion

In conclusion and given the facts and circumstances of the complaint I am not persuaded that Lender has acted unfairly or unreasonably when it considered Mr J and Mrs MJ's Section 75 claim. Furthermore, I'm not persuaded the Lender was party to a credit relationship with Mr J and Mrs MJ under the Credit Agreement that was unfair to them under Section 140A of the CCA. Having considered everything in this matter I see no persuasive reason that the Lender should compensate Mr J and Mrs MJ or do anymore.

My final decision

I do not uphold Mr J and Mrs MJ's complaint about First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J and Mrs M to accept or reject my decision before 21 July 2025.

Rod Glyn-Thomas
Ombudsman